No. 91-489

In The

Supreme Court of the United States

October Term, 1991

OMAHA INDIAN TRIBE, TREATY OF 1854, ORGANIZED PURSUANT TO THE ACT OF JUNE 18, 1934 (48 STAT. 984; 25 U.S.C. 476) AS AMENDED,

Petitioner,

v.

AGRICULTURAL & INDUSTRIAL INVESTMENT COMPANY; JOHN R. WILSON; CHARLES E. LAKIN, FLORENCE LAKIN; R.G.P., INC., AN IOWA CORPORATION; HAROLD JACKSON; OTIS PETERSON; DARRELL L. HAROLD, and LUEA SORENSON; STATE OF IOWA and IOWA DEPARTMENT OF NATURAL RESOURCES, et al.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF FOR STATE OF IOWA AND IOWA DEPARTMENT OF NATURAL RESOURCES IN OPPOSITION

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Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF FOR STATE OF IOWA AND IOWA DEPARTMENT OF NATURAL RESOURCES IN OPPOSITION

Respondents State of Iowa and the Iowa Department of Natural Resources respectfully oppose the Petition of the Omaha Indian Tribe for a Writ of Certiorari to review

the opinion of the Court of Appeals for the Eighth Circuit rendered on May 28, 1991.

STATEMENT OF THE CASE

Plaintiff repeatedly violated court orders in this 15-year-old case, culminating in a failure to submit an acceptable pretrial order and to provide meaningful discovery of its experts' theories. On September 29, 1989, with an estimated twelve-week trial set for November 6, Judge Edward J. McManus ordered this case dismissed if plaintiff failed to file an acceptable pretrial order by October 16. (Pet. App. 175a-178a). (This was the third deadline for the pretrial order.) On May 7, 1990, Judge Warren Urbom found that plaintiff had failed to meet this condition. (Pet. App. 2a-17a). On May 29, 1990, after hearing, Judge Urbom ordered the case dismissed with prejudice. (Pet. App. 24a-39a).

The District Court held that Plaintiff's failures, including concealment of its experts' avulsion theories, were "conscious and intentional" and part of a systematic pattern of noncompliance with court orders. (Pet. App. 37a). Previous sanctions, including monetary sanctions and jailing for contempt had failed to ensure compliance with court orders. (Pet. App. 35a). The Court of Appeals affirmed, holding the District Court did not abuse its discretion in determining that "no sanction other than dismissal could remedy the Tribe's record of past and intended future noncompliance with court orders." (Pet. App. 49a, 51a-56a).

The Omaha Indian Tribe filed this case in 1975. Plaintiff basically claimed that after 1867 the river always moved away from its Nebraska reservation by accretion, adding over 8000 acres to the reservation. The Tribe's claims depended on proof that these lands were then "cut off" from the reservation by various alleged avulsions. (Pet. App. 4a).

The Tribe seized occupancy of Iowa land in 1975. *United States v. Wilson*, 433 F.Supp. 67, 69 (N.D. Iowa 1977) (*Blackbird Bend I*). The United States then filed suit to quiet title to 2,900 acres within the original reservation in Blackbird Bend. (Pet. App. 43a). The Tribe filed its own suit, claiming an additional 8,000 acres outside the original reservation boundaries in Blackbird Bend, Monona Bend, and Omaha Mission Bend. (Pet. App. 43a).

The claims for lands within the original reservation were tried in 1976. The District Court ruled that Plaintiffs failed to prove avulsions. *Blackbird Bend I*, 433 F.Supp. 67 (N.D. Iowa 1977). There followed one decision by the United States Supreme Court, four by the Court of Appeals for the Eighth Circuit, and two district court decisions on remand. *Omaha Indian Tribe v. Jackson*, 854 F.2d 1089 (8th Cir. 1988), *cert. denied*, 490 U.S. 1090 (1989) (*Omaha IV*); *United States v. Wilson*, 578 F.Supp. 1191 (N.D. Iowa 1984) (*Blackbird Bend III*); *United States v. Wilson*, 707 F.2d 304 (8th Cir. 1982) (*Omaha III*); *United States v. Wilson*, 523 F.Supp. 874 (N.D. Iowa 1981) (*Blackbird Bend II*); *Omaha Indian Tribe v. Wilson*, 614 F.2d 1153 (8th Cir. 1980), *cert. denied* 449 U.S. 825 (1980) (*Omaha II*); *Wilson v. Omaha Indian Tribe*, 442 U.S. 653 (1979) (Pet. App. 61a) (*Wilson*); *Omaha Indian Tribe v. Wilson*, 575 F.2d 620 (8th Cir. 1978) (*Omaha I*) (Pet. App. 89a); *United States v. Wilson*, 433

F.Supp. 57 (N.D. Iowa 1977) (*Blackbird Bend I*). Ultimately, the Tribe prevailed as to the 1900 acres of former trust lands where 25 U.S.C. § 194 created a presumption of Indian title. However, the Tribe lost whenever it had the burden to prove that avulsions occurred – i.e., as against the State and as to claims to fee patent lands. *Blackbird Bend III*, 578 F.Supp. 1191, 1195 (N.D. Iowa 1984).

The Tribe instructed its attorney to resist entry of final judgment in the first portion. (App. 2-3). The tribal chair threatened the court-ordered survey crew that "we will fight you in the field." (App. 1). From 1985 on, the Tribe filed numerous delaying motions claiming the Justice Department committed fraud by limiting its complaint. The Court of Appeals found these claims frivolous. *Omaha Indian Tribe v. Agricultural and Industrial Investment* (Pet. App. 40a, 50a-51a, 56a); *Omaha IV*, 854 F.2d 1089, 1092 n.4 (8th Cir. 1988); *In re Omaha Indian Tribe* (No. 86-1717) (8th Cir. July 18, 1986) (order denying writ of prohibition and imposing sanctions). On December 1, 1986, Plaintiff's trespass damage claims within the Barrett Survey were dismissed for failure to comply with discovery orders. (C.C. filing #700).

After the State regained possession of its lands in Blackbird Bend by court order, the Tribe refused entry, patrolled the land with armed officers, and destroyed 47 trees. On May 1, 1987, tribal council members were jailed for contempt after each testified they would never comply with the court orders. (See Pet. App. 36a, App. 5-6). The Tribe was then warned that "[i]f the Tribe and Morris continue to disobey the court's orders, the court will consider further sanctions including . . . dismissing the unconsolidated portion of C75-4067. . . . " (See App. 5).

The State also obtained an injunction against the Tribe in June 1989 after it plowed State land in Monona Bend. (filing #254).

While the Barrett Survey portion was being litigated, Plaintiff made no effort to move this portion of the case to trial. On August 10, 1988, Defendants served interrogatories to discover Plaintiff's experts' theories of the case. Plaintiff refused to comply. On January 26, 1989, the Magistrate ordered Plaintiff to respond and designate experts. On March 24, 1989, Judge McManus denied Plaintiff's motion for a stay, citing the Tribe's repeated disobedience of court orders, and threatened the Tribe with dismissal unless the Tribe and its counsel complied with the court orders. (App. 4-10).

On June 6, the Magistrate entered an order limiting Plaintiff's expert testimony and excluding any evidence of damages as a sanction for Plaintiff's failure to provide discovery. (Pet. App. 162a-166a). On June 9, the Magistrate set trial for October 31, 1989, and required the parties to submit an agreed proposed pretrial order in the form attached by September 1.

The parties met on August 22 to prepare the pretrial order. In later awarding sanctions for Plaintiff's failure to participate in good faith at that conference, Judge McManus cited Mr. Veeder's comment that he had not agreed on anything in 13 years and saw no reason to do so now. (Pet. App. 219a).

At the final pretrial conference on September 8, the Magistrate found the pretrial order unacceptable. The Magistrate described the proposed order as simply a xeroxed stack of the parties' proposals. There was no

agreement on anything. The Tribe was ordered to submit a revised order by September 25. Instead, the Tribe filed another motion to reconsider.

On September 29, 1989, about one month before trial, the Court expressly told Plaintiff its case would be dismissed if it failed to file an acceptable pretrial order by October 16. The Court found the Tribe had a "dismal history of noncompliance with court orders." (Pet. App. 196a-199a). Although the District Court agreed with the Magistrate that Plaintiff had not provided any meaningful statement of its experts' expected testimony, the Court reversed the order excluding Plaintiff's experts (Pet. App. 197a). As discovery had closed and it was less than a month before the scheduled trial, the Court ordered Plaintiff to make its experts available for depositions. (Pet. App. 220a).

Plaintiff's case depended upon proof of avulsions. (Pet. App. 4a). The last-minute depositions revealed six avulsion claims never previously disclosed. (Pet. App. 4a-6a). Yet the Tribe had repeatedly insisted that its answers to interrogatories and proposed pretrial orders submitted prior to these depositions had fully disclosed its claims. (Pet. App. 5a-6a, *see, e.g.*, Pet. App. 170a).

Defendants filed motions to dismiss. Judge McManus then withdrew. On October 30, one week before the scheduled trial, the trial date was indefinitely postponed. The Honorable Warren Urbom United States District Court for the District of Nebraska, was then designated to try this case. (Pet. App. 222a).

On January 16, 1990, the Magistrate found that the Tribe's proposed pretrial order " . . . does not comply

with previous orders directing its preparation." (Pet. App. 281a-283a). The Tribe did not appeal. Plaintiff had failed to even circulate the October 16 proposed pretrial order revision to opposing counsel. Instead, Plaintiff again stacked the parties' separate submissions together. The proposed pretrial order included the fraud claim which had been excluded from trial by an order in limine, and it failed to include six avulsions claimed by Plaintiff's experts. The District Court found Plaintiff's refusal to provide discovery was conscious and intentional, and not an occasional inadvertence. (Pet. App. 37a).

Judge Urbom provided a hearing on the sanctions issue and concluded, as had Judge McManus earlier, that no sanction would ever result in compliance. Previous sanctions included awards of fees, dismissal of damages claims, jailing of tribal council members, and the order excluding expert testimony. (Pet. App. 35a-36a).

REASONS WHY THE PETITION SHOULD BE DENIED

SUMMARY OF ARGUMENT

Petitioner has made no attempt to establish a reason for granting the writ. Instead the petition re-argues case-specific procedural and factual issues which have been decided adversely to Petitioner by both the District Court and the Court of Appeals. The petition raises no significant question of law. There is no conflict in the lower courts.

The questions presented are hostile and argumentative and rely on factual assertions which are incorrect. The descriptions of the proceedings below and of the

record are misleading. The petition primarily focuses on a fraud claim which was rejected and determined to be frivolous by the Court of Appeals on two occasions in an earlier portion of this case, which is now reduced to final judgment. This Court previously denied the writ of certiorari on that issue.

Dismissal of Plaintiff's case was warranted by its continued intentional disobedience of court orders. Repeated warnings and other sanctions, including incarceration, monetary sanctions, and dismissal of damages claims, failed to ensure compliance. The District Court expressly warned Plaintiff its case would be dismissed if it did not meet the third and last deadline for filing an acceptable pretrial order. Plaintiff made no attempt to agree to anything in order to prepare for the anticipated twelve-week long trial then only a month away. Further, subsequent compelled depositions revealed that Plaintiff had concealed its experts' theories despite repeated claims that it had fully disclosed those theories. The District Court and Court of Appeals had a more than adequate basis to conclude that the Tribe's intentional past and future noncompliance with court orders required dismissal of this case. Plaintiff had not, and would not, comply with court orders necessary to bring this case to trial. The case was therefore properly dismissed.

I. THE PETITION RELIES ON DISPUTED FACTS WHICH ARE CONTRARY TO THOSE FOUND BY THE DISTRICT COURT AND THE COURT OF APPEALS.

The questions presented are argumentative and assume the existence of facts which are not true. The

Court should not grant certiorari because the questions presented for review by Petitioner are fact specific and those facts are in dispute. This Court should not grant certiorari to review evidence and discuss specific facts. *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175, 178 (1938). The factual issues raised by Petitioner are episodic and as such have no implications beyond the dispute between these two parties. *See Rice v. Sioux City Cemetery*, 349 U.S. 70, 74 (1955).

The Court should not grant certiorari because the questions presented for review by Petitioner raise no questions of law, and there is no conflict between the circuits. Resolution of the questions presented by Petitioner would have no effect on anyone but the immediate parties. This Court has stated, "[I]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal." *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923).

Plaintiff asserts it was denied "Judicial Due Process" by the District Court's alleged failure to hold a hearing. (Pet. 14-15). Even though Plaintiff never appealed the Magistrate's determination that it failed to meet the condition of the September 29 order, Judge Urbom reviewed the motions to dismiss and resistances *de novo*. (Pet. App. 3a, 14a-15a). Further, the Court scheduled a hearing at a time agreeable to all parties to address whether dismissal or other sanctions were appropriate. (Pet. App. 17a, 39a). The May 29 order addressed all pending motions the

Tribe had asked the Court to consider. (Pet. App. 25a-39a). The Court of Appeals correctly found the Tribe had an opportunity to address the charges and the propriety of dismissal. (Pet. App. 55a-56a).

The District Court concluded that no other sanction would ensure compliance. (Pet. App. 35a-37a). It determined that the failure to file the pretrial order and to disclose the six avulsions was not an isolated incident; "[r]ather it is only one incident in a series of many that demonstrate the plaintiff's unwillingness to abide by the orders of this court." (Pet. App. 33a). Further, the District Court found that Plaintiff's actions were "conscious and intentional." (Pet. App. 37a).

The District Court fully considered and rejected Plaintiff's excuses. (Pet. App. 28a-34a). At the hearing Plaintiff's counsel contended he had no idea what avulsions defendants were talking about, but the Plaintiff's December 5, 1989, motion described three of the six. (Pet. App. 33a). Plaintiff now argues the disclosure of the three avulsions in the December 5 motion cures its nondisclosure. (Pet. 17-18). This partial disclosure came two months after the final deadline for the pretrial order, long after the court orders compelling disclosure of the experts' theories, and only after these theories had been revealed in the compelled depositions on the eve of trial. As the District Court stated, "The premise of this argument seems to be that the plaintiff could not have failed to disclose any information because the defendants found out about it anyway." (Pet. App. 32a).

The Tribe and its officers exhibited willful disobedience of court orders. (Pet. App. 36a). The Tribe is aware

of, and has participated in, a long-standing pattern of refusal to obey court orders. (*See* App. 5-9; Pet. App. 35a-37a). Tribal council members were jailed for contempt when they refused to comply with an injunction to return possession of the State land in Blackbird Bend. (Pet. App. 36a). All other sanctions had been imposed, and none worked. The decision that dismissal was appropriate is reasonable.

II. THERE IS NO REASON FOR THIS COURT TO HEAR THE "FRAUD" ISSUE AS THAT ISSUE WAS NOT PROPERLY PRESERVED, HAS BEEN REPEATEDLY REJECTED AS FRIVOLOUS, AND WOULD NOT PROVIDE A GROUND FOR RELIEF FROM THE JUDGMENT, EVEN IF TRUE.

The Tribe claims the United States Department of Justice fraudulently denied it title to land by excepting the land from its complaint.[1] (Pet. 11, 14, 18-28). This claim has been repeatedly rejected by the District Court and Court of Appeals as wholly frivolous and without merit. *Omaha IV*, 854 F.2d at 1092 n.4, *cert. denied*, 490 U.S. 1090 (1989); *In re Omaha Indian Tribe*, No. 86-1717 (8th Cir. July 18, 1986). These decisions are now law of the case. (Pet. App. 50a-51a). The final judgment in the first portion conclusively resolves this issue, and the fraud claim is wholly irrelevant to the dismissal challenged here. The United States claimed only "trust lands" within Blackbird Bend. This included the area which was once within the reservation except land which had been conveyed in fee

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[1] The petition includes an *ex parte* "certificate of counsel." (Pet. 8-14). This extra-record statement may not be properly considered by the Court. *Hopt v. Utah*, 114 U.S. 488, 491-92 (1885); *Adickes v. Kress & Co.*, 398 U.S. 144, 157-58 n.16 (1970). These defendants dispute the allegations of fact and inferences drawn in that "certificate."

to individuals. *Blackbird Bend I*, 433 F.Supp. 67, 70 (N.D. Iowa 1977). This Court recognized the same distinctions in *Wilson v. Omaha Indian Tribe*, in holding that the presumption of Indian title created by 25 U.S.C. § 194 applied to the area within the reservation (Pet. App. 77a), and in recognizing that state law would apply to claims where the United States had patented lands to private owners (Pet. App. 79a).

The placement of the burden of proof, not whether the United States claimed the land, determined the outcome of the first portion of this case. *United States v. Wilson*, 578 F.Supp. 1191, 1195 (N.D. Iowa 1984). Because of 25 U.S.C. § 194 as construed in *Wilson v. Omaha Indian Tribe* (Pet. App. 61a, 77a), private defendants bore the burden of proof concerning trust lands within the reservation. Section 194 does not, however, apply to lands claimed by the State, which is not a "white person." *Wilson v. Omaha Indian Tribe* (Pet. App. 75a-77a). The Tribe was compelled to bear the burden of proof as to the State and the fee-patent lands. *Omaha III*, 707 F.2d 304, 308-10 (8th Cir. 1982). The Tribe was not able to meet this burden.

The more narrow scope of the United States' complaint did not preclude the Tribe from filing its own lawsuit, claiming an additional 8000 acres. The Tribe has now lost this suit not because the United States "abandoned" the claim but because the Tribe continually refused to comply with court orders in its own case.

III. THE DISTRICT COURT'S DECISION, WHICH WAS AFFIRMED BY THE COURT OF APPEALS, WAS NOT CLEARLY ERRONEOUS.

In reviewing trial court decisions claimed to be "clearly erroneous" under Fed. R. Civ. P. 52(a), this Court

has consistently emphasized the degree of deference to be given a trial court's findings. *Andersen v. Bessemer City*, 470 U.S. 564, 573-74 (1985). *See also Amadeo v. Zant*, 486 U.S. 214, 222-29 (1988). The Court of Appeals applied the correct legal standard and upheld the trial court findings. This Court is a court of law "rather than a court for correction of errors in fact finding." *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949). This Court has previously stated, "Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it." *General Talking Pictures Corp.*, 304 U.S. at 178. It is apparent that the petition seeks to embroil this Court in case-specific review of facts. Granting the writ would be an unwarranted use of the limited resources of this Court.

CONCLUSION

For the reasons set forth above, Respondents State of Iowa and the Iowa Department of Natural Resources respectfully request this Court to deny the Tribe's Petition for a Writ of Certiorari.

Respectfully submitted,

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ADDENDUM TO BRIEF IN OPPOSITION

ATTACHMENT C TO UNITED STATES MOTION
FOR ORDER TO SHOW CAUSE RE: CIVIL CONTEMPT
Filed June 28, 1985

Wallace Wade Miller, Chairman
PO Box 368
Macy, NE 68039 01AM

4-0088078183 07/01/84 ICS IPMBNGZ CSP WHSB
4028375391 MGMB TD8N MACY NE 165 07-01 0154P EST

MR. JOHN FRITZ, DEPUTY ASSISTANT SEC.
DEPT. OF THE INTERIOR,
BUREAU INDIAN AFFAIRS
1951 CONSTITUTION AVE, N.W.
WASHINGTON DC 20245

DEAR MR. FRITZ,

THIS IS TO INFORM YOU THE OMAHA TRIBE OF NEBRASKA TAKES GREAT OFFENSE THAT YOU, THE TRUSTEE FOR INDIANS IN THIS COUNTRY, ACTING THROUGH SID MILLS, HAVE AGREED TO TAKE INDIAN APPROPRIATED MONEY AND GIVE BENEFIT TO WHITE SQUATTERS ON INDIAN LANDS, AND PAY FOR A SURVEY THAT IS ILLEGAL IN THE FIRST PLACE, BUT MORE IMPORTANT, AGAINST INDIANS, WE CAN THINK OF A LAWSUIT AGAINST YOU BY A GROUP OF INDIANS TO STOP YOU AND YOUR ILLEGAL ACTIVITIES.
IT IS APPARENT THE OMAHA TRIBE OF NEBRASKA IS FIGHTING THE WHOLE U.S. GOVERNMENT, WHO IS DETERMINED THAT THE TRIBE WILL NOT BE PERMITTED TO HAVE ITS DAY IN COURT, THE TRIBE IS HEREBY PUTTING YOU ON NOTICE WE WILL FIGHT YOU IN THE FIELD AND THAT YOU WILL BE HELD RESPONSIBLE FOR WHATEVER HAPPENS.

WALLACE WADE MILLER, CHAIRMAN, OMAHA TRIBE OF NEBRASKA

13:57 EST

MGMCOMP

"ATTACHMENT C"

RESOLUTION OMAHA TRIBAL COUNCIL
filed November 28, 1986

Whereas, the Tribe has been and is now being victimized by the fraud of Hultman, Flint, and Clear, the Omaha Indian Tribe has directed its Counsel William H. Veeder to resist and to continue to resist the entry of the fraudulent judgment in the case of *United States v. Wilson . . . State of Iowa, et al,* and attaches to this Resolution a copy of Tribe's November 3, 1986 Motion to Exclude Plaintiff Tribe From Judgment In C 75-4024; To Suspend Sanctions And Discovery As To Plaintiff Tribe;

NOW, THEREFORE, BE IT RESOLVED at this Special Meeting by all members of the newly elected Tribal Council that Counsel William H. Veeder is hereby directed:

1. To continue to represent the Omaha Indian Tribe in the above entitled cases and to adhere to the concepts and principles set forth in the November 3, 1986 Motion;

2. To continue to resist the entry of a final judgment in the fraudulent case of *United States v. Wilson . . . State of Iowa, et al.,* No. 75-4024; and

3. To take whatever action is appropriate to prevent the entry of a final judgment in C 75-4024, including but not limited to appellate relief in a court of last resort.

APPROVED BY UNANIMOUS
VOTE OF OMAHA
TRIBAL COUNCIL.

CERTIFICATION

This is to certify that the foregoing resolution was considered at a meeting of the Omaha Tribal Council of the Omaha Tribe of Nebraska, duly called and held on the 11th day of November, 1986 and was adopted ~~by a vote of ____ against, and ____ not voting or absent.~~ A quorum of 7 was present with the Chairman not voting.

Dated this 11th day of November, 1986.

/s/ Doran L. Morris, Sr.
Chairman

ATTEST:

WYNONA S. MORRIS	[ ] M. Lovejoy
Vice-Chairman	Treasurer
Nate J. Parker, Sr.	John M. Miller
Secretary	Council Member
Forrest Aldrich, Jr.	Edward E. Webster
Council Member	Council Member

ORDER
filed March 24, 1989

This matter is before the court on the following motions:

1. Resisted motion to dismiss, filed by defendants Wilson, Lakin, Jackson, and RGP, Inc. (Agricultural docket #166, filed August 11, 1988);

2. Resisted motion to dismiss, filed by defendants Iowa and Iowa Department of Natural Resources (DNR) (Agricultural docket #169, filed August 22, 1988);

3. Resisted motion to declare the May 29, 1987 Final Judgment and Decree res judicata against defendants respecting title to lands outside the Barrett line, filed by plaintiff Tribe (Agricultural docket #174, filed September 27, 1988);

4. Resisted motion to stay, filed by plaintiff Tribe (Agricultural docket #186, filed October 20, 1988); and

5. Resisted motion to prohibit plaintiff from farming on State land in Lower Monona Bend, and request for hearing thereon, filed by defendants Iowa and Iowa DNR (Agricultural docket #'s 192 and 206, filed November 29, 1988 and March 6, 1989 respectively).

These motions shall be addressed seriatim.

Defendants' Motions to Dismiss

Defendants Iowa and Iowa DNR (Docket #169), and defendants Wilson, Lakin, Jackson, and R.G.P., Inc. (docket #166) move for dismissal pursuant to FRCP 41(b)

as a sanction for the Tribe's failure to comply with court orders issued in the consolidated portion of this case.[1]

In support, these defendants urge that the Tribe has failed to comply with the following court orders:

1. Docket #759, Order entered April 17, 1987:

On January 17, 1987, the court enjoined the Tribe and its individual members from interfering with the defendant's use and occupancy of the non-trust lands within Blackbird Bend. As detailed in the order of April 17, 1987, the Tribe and Tribal Chairman Doran L. Morris, Sr. refused to obey the court's order, and they were then held in contempt.

As part of the contempt order, the Tribe was ordered to pay Iowa $1,667.70 in compensatory damages for willfully cutting forty-six trees on Iowa's land, and $2,335.40 pursuant to Iowa Code § 658.4, as well as costs and attorney fees incurred by Iowa in connection with the motion for contempt.[2] The Tribe was then warned that "[i]f the Tribe and Morris continue to disobey the court's orders, the court will consider further sanctions including . . . dismissing the unconsolidated portion of C75-4067. . . . "

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[1] The consolidated portion of this case is that which was consolidated with C75-4024 and C75-4026, and decided only the Barrett Survey area.

[2] On June 30, 1987, the court found that Iowa reasonably incurred $14,807.71 in connection with its motions of February 2, 1987, and February 20, 1987, which sought an order to show cause why the Tribe and Morris should not be held in contempt.

The Tribe has not complied with the contempt order requiring them to pay $4,003.10 to defendant Iowa.

2. Docket #788, Order entered May 22, 1987:

On April 21, 1987, and April 23, 1987, Iowa and defendants Wilson, Lakin, Jackson and R.G.P., Inc. again sought to have the Tribe held in contempt. After a hearing on May 1, 1987, the Tribe was held in contempt and tribal members were incarcerated due to their contemptuous conduct. The incarcerated tribal members were released from jail on May 1, 1987 and the Tribe was absolved from paying the daily $10,000 fine upon its agreement to comply with court orders. However, and in accordance with the order of May 22, 1987, the Tribe was ordered to pay a fine of $2,000 and Tribe Chairman Doran L. Morris was ordered to pay a fine of $1,000 to the Clerk of Court by not later than June 12, 1987. Additionally, the Tribe was ordered to pay to defendants all costs and fees incurred in connection with bringing the second contempt motion.[3]

Though ordered to pay the above fines by not later than June 12, 1987, neither the Tribe nor Morris have paid any part of the fines, nor have they come forward with any reason for their failure to obey the order.

---

[3] On June 30, 1987, the court awarded Iowa $6,558.37 for expenses incurred in bringing the second contempt action. Additionally, defendants Wilson, Lakin and Jackson were awarded $6,556.33 and defendant R.G.P. Inc. was awarded $2,598.34 for expenses incurred in connection with the second contempt citation.

3. Docket #809, Order entered June 30, 1987:

As set forth in footnotes 1 and 2, *infra*, this order required the Tribe to pay $21,366.08 to Iowa in connection with the two contempt citations. The Tribe has wholly failed to comply. Additionally, sanctions were therein imposed on the Tribe's attorney, William H. Veeder, in connection with his filing a frivolous summary judgment motion. He was ordered to pay the following amounts to the listed parties:

Iowa	$325.00
R.G.P. Inc. and Otis Peterson	$360.00
Wilson, Lakin and Jackson	$749.70
United States	$1,875.00

Mr. Veeder has not complied with this order.

Moreover, sanctions were imposed on the Tribe and its attorney, Mr. Veeder, in connection with the Tribe's failure to respond to discovery requests. The Tribe and Mr. Veeder were ordered to pay the following amounts to the listed parties:

Iowa	$212.50
Wilson, Lakin and Jackson	$251.00

Again, the Tribe and Mr. Veeder have not complied with this order.

4. Dočket #842, Order entered June 3, 1988:

On November 16, 1987, the Inspector General of the Department of the Interior filed an audit (docket #838) of tribal payments made to the Clerk of Court's Registry fund. Upon examination, the court ordered the United States to supplement the audit as to a questionable item which was included as a 1986 crop year expense, yet

appeared to be unrelated to farming operations. After reviewing the supplement, on June 3, 1988, the court ordered the Tribe to pay $6,878.18 to the Clerk of Court's Registry fund by not later than June 20, 1988. Again, the Tribe has not complied with this order.

In its resistance (docket #174) to the pending motions to dismiss, the Tribe urges that dismissal under FRCP 41(b) is too drastic a sanction. The Tribe asserts that it is "[unable] to pay the astronomical sanctions imposed." While financial ability to pay sanctions is a relevant consideration under some circumstances, see *Herring v. City of Whitehall*, 804 F.2d 464 (8th Cir. 1986), no satisfactory showing has been made here as to either Mr. Veeder or the Tribe. In passing, the court notes that the $6,878.18 which the Tribe was ordered to (and failed to) pay to the Clerk's Registry fund by not later than June 20, 1988, was not a sanction, but rather represents the recapture of an improperly claimed expense against farming operations.

As illustrated above, the Tribe has repeatedly failed to comply with court orders directing it to pay finds for contemptuous conduct. Additionally, the Tribe has ignored orders requiring it to pay expenses to those that were forced to respond to that contemptuous conduct. Further, the Tribe and Mr. Veeder have ignored orders imposing sanctions for failure to respond to discovery requests, and Mr. Veeder has ignored sanctions imposed for submitting frivolous filings. Moreover, the court notes that upon the Tribe's past failure to comply with court orders regarding discovery, the Tribe's damage claim relating to trust land within the Barrett Survey area was dismissed with prejudice on November 17, 1986 (docket #695).

FRCP 41(b) authorizes this court to dismiss an action for the plaintiff's failure to comply with any court order, and unless otherwise specified, such a dismissal operates as an adjudication on the merits. *Brown v. Frey*, 806 F.2d 801, 803 (8th Cir. 1986). Dismissal with prejudice is a drastic sanction, but it is within the permissible range of the court's discretion in situations where there is a clear record of contumacious conduct. *Id. See also Moon v. Newsome*, 863 F.2d 835 (11th Cir. 1989); *American Inmate Paralegal Assoc. v. Cline*, 859 F.2d 59, 61 (8th Cir. 1988); *Enlace Mercantil Internacional v. Senior Industries*, 848 F.2d 315, 317 (1st Cir. 1988). This case presents such a record. Plaintiff has repeatedly ignored or actively disobeyed court orders, even after partial dismissal of its case, incarceration, and a warning that continued failure to obey court orders might result in dismissal of the unconsolidated portion of this case. The history of this case clearly shows that lesser sanctions have been systematically and flagrantly disregarded, and are ineffective to achieve compliance.

While the court respects the tenacity with which parties may adhere to sincerely held beliefs and positions, the bounds of vigorous advocacy are far exceeded by the well documented and persistent failure to comply with the court's orders. A party simply may not be permitted to submit a case to this forum for resolution, take advantage of favorable rulings, and then disregard those that are unfavorable.

The unconsolidated portion of this case[4] shall be dismissed with prejudice pursuant to FRCP 41(b) unless

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[4] The unconsolidated portion of this case constitutes all of the Tribe's remaining claims to any land outside the Barrett

(Continued on following page)

the Tribe and Mr. Veeder comply with each particular of the foregoing court orders, or show cause why they should not be required to do so.

* * *

Plaintiff's Motion to Stay

Plaintiff asks the court to stay any further proceedings pending exhaustion of all possible appellate review 1) of its previously noted res judicata question, 2) of its challenge to the adequacy of this court's findings of fact and conclusions of law in the consolidated cases, 3) of its claim to farming profits in the Clerk of Court's Registry fund, and 4) of its fraud claim.

In the Court's view the matters raised by the Tribe are wholly without merit, and moreover, it does not appear that the Tribe contends that Omaha Mission Bend and Monona Bend would be affected by the matters raised. Discovery is now scheduled for completion by not later than August 1, 1989, and this case has been pending for well over a decade. The motion for stay shall be denied, and discovery shall proceed in accordance with orders issued by the Magistrate.

Defendant Iowa's Motion to Prohibit Farming

Defendant Iowa asserts that in 1988 the Tribe began farming approximately 56.6 acres of State land in Lower Monona Bend, located in Iowa on the Nebraska side of

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(Continued from previous page)

Survey area and within Blackbird Bend, Monona Bend, and Omaha Mission Bend.

the Missouri River. Iowa contends that it has managed this area as a natural wildlife habitat since before the inception of this litigation, except for a brief interruption by the Tribe in 1982. The State asserts that in 1982 the Tribe burned and plowed approximately 25 acres of the State's land in preparation for farming, but after a meeting between the State and Tribal officials, the Tribe agreed to cease the challenged farming activities, and further agreed not to interfere with the State's interest in the land.

The State now seeks an order enjoining the Tribe from farming or otherwise attempting to take possession of this land in Lower Monona Bend. In support, the State urges that irreparable harm will result from the destruction of the natural wildlife habitat, and that issuance of an injunction will not harm the Tribe. The State forwards its belief that it will prevail on the merits of the matter, and urges that there is a very strong public interest in preservation of natural wildlife habitat. The State also seeks an order requiring the Tribe to pay any farming profits from this land into the Clerk of Court's Registry fund.

In resistance, the Tribe urges that Iowa has not provided a meaningful description of the land in question, and that contrary to Iowa's assertion, there never was a meeting and agreement in 1982 between Iowa and the Tribe. Moreover, the Tribe urges that it has been in exclusive possession and control of the land at all relevant times.

Ruling shall be reserved on Iowa's motion to prohibit farming.

It is therefore

ORDERED

1. The unconsolidated portion of this case is dismissed with prejudice unless the Tribe and Mr. Veeder either fully comply with all orders in each particular as set forth herein, or show cause why they each should not be required to do so by not later than April 10, 1989.

2. The Tribe's motion to declare the court's May 29, 1987 Final Judgment and Decree res judicata as to the remaining unconsolidated Blackbird Bend lands is denied.

3. The Tribe's motion to stay is denied.

4. Ruling reserved on Iowa's motion to prohibit farming. The parties shall appear in the 3rd Floor courtroom, United States Courthouse, Cedar Rapids, Iowa, at 9:00 a.m. on Friday, April 14, 1989, for a prehearing conference before U.S. Magistrate John A. Jarvey. Hearing on Iowa's request for preliminary injunction is set for 10:00 a.m. in said courtroom.

March 24, 1989.

/s/ Edward J. McManus, Judge
UNITED STATES
DISTRICT COURT